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No. 09-161

IN THE

Supreme Court of the United States

ANDREW J. MILLER,

Petitioner,

v.

MIGUEL VILLEGAS, et al.,

Respondents.

On Petition for Writ of Certiorari to the Indiana Court of Appeals

REPLY IN SUPPORT OF THE PETITION

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REPLY IN SUPPORT OF THE PETITION

Respondent Miguel Villegas[1] argues that the Indiana Bureau of Motor Vehicles' ("BMV") Petition asks the Court to depart from well-established precedent regarding when a party has "prevailed" sufficient to justify an award of Section 1988 attorney fees. Villegas Br. 10. The BMV has asked for no such thing. To the contrary, the BMV urges the Court to reaffirm its established doctrine by summarily reversing the lower court's erroneous application of the Court's precedents.

According to Villegas, "the Indiana Court of Appeals properly applied the well-established test, adopted by this Court [in *Maher v. Gagne*, 448 U.S. 122 (1980)], for awarding fees where fee-generating claims in litigation are not resolved but plaintiffs are successful on a pendent non-fee generating claim." Villegas Br. 5. Proper Section 1988 analysis does not end with *Maher*, however—a party cannot "prevail" for Section 1988 purposes merely by showing that an undecided federal claim was substantial and arose out of a common nucleus of operative fact with a successful state-law claim. Rather, as the Court held in *Farrar v. Hobby*, "a plaintiff 'prevails'" *only* "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that *directly benefits the plaintiff*." 506 U.S.

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[1] For ease of reference, this brief will refer to the entire Respondent class as "Villegas."

103, 111-12 (1992) (emphasis added). This case is about applying *Farrar*, not about overruling *Maher*.

I. Villegas Has Not Established That Any Member of the Plaintiff Class Has "Directly Benefited" From This Litigation

Villegas has never attempted to demonstrate that any named plaintiff or member of the plaintiff class has directly benefited from this litigation, and, in point of fact, the BMV policy never changed in a way that could have benefited anyone. Thus, summary reversal is appropriate.

1. The best Villegas offers is to contend that the BMV's properly promulgated rule "expanded the documents acceptable for identification, thus allowing *some* class members to obtain their licenses, permits, or identification cards." Villegas Br. 6 (emphasis added). Even on its face the truth of that contention is far from self-evident, particularly since no named plaintiff (all of whom are illegal immigrants) actually fits within the class of individuals bearing valid but previously unlisted INS documentation. Indeed, Villegas's argument is conceivable only because of an exceedingly broad class definition that bears no relation to the original objectives of the lawsuit.

Notably, the plaintiffs did not receive class certification until *after* the trial court had already dismissed their claim for lack of standing. *See* Pet.App. 6A-7A. The trial court's *nunc pro tunc*

order certified the class as "all current and future persons in Indiana who are, or who will be, required by defendant to produce information concerning their citizenship or immigration status in order to obtain an Indiana driver's license or permit or a state identification card, but who are, or will be, unable to produce the identification mandated by the Indiana Bureau of Motor Vehicle's non-promulgated identification requirements." Pet.App. 7A. Because the case had already been dismissed, the trial court's certification of this extremely broad class was granted with no expectation of any benefit to the class. Furthermore, with the case already disposed of, the trial court judge had little reason or incentive to examine the class closely or to ask the plaintiffs to narrow it in any way.

The breadth of the plaintiff class makes it impossible to suggest with any confidence that any class members benefited from this litigation. In a typical class action where a class representative actually shares relevant characteristics with class members, victory for the class representative means victory for all or most of the class. Here, however, the whole point of the lawsuit was to enable illegal immigrants such as the named plaintiffs to obtain state identification, but the technical "victory" the representative plaintiffs received yielded nothing of the sort, nor anything else benefiting them (or anyone else, so far as the record shows).

Nonetheless, the plaintiff class is so wildly diverse that Villegas feels comfortable speculating

that "some" members must have benefited in some way. *See* Villegas Br. 6. A victory that provides only a hypothetical benefit to a hypothetical class member, however, is a prototypical "technical victory" that cannot justify fees. *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) ("[A] technical victory may be so insignificant . . . as to be insufficient to support prevailing party status."). Without a concrete benefit to the named plaintiffs or, at the very least, some reasonably certain benefit to a larger class, the rationale behind awarding fees crumbles.

2. More fundamentally, Villegas is simply wrong to say that the BMV's new regulation expanded the range of acceptable documents. While the later (valid) rule expressly identified a few additional INS documents, the prior (invalidated) policy provided that INS documentation not expressly listed was still acceptable. *See* Pet.App. 88A ("The rule provides a specific listing of INS documents. It also provides a catch-all of 'other INS documentation subject to BMV Driver Services approval.'"). Thus, even before this lawsuit, Indiana residents bearing the INS documents specifically delineated by the BMV's later promulgated rule would have been eligible for licenses and identification. The newly promulgated rule in effect added nothing and therefore could have benefited no one.

Furthermore, there is no way in which the Court of Appeals decision itself could have benefited the named plaintiffs or members of the class. The Court

of Appeals remanded the case to the trial court for further proceedings, but did *not* enjoin the BMV from enforcing the announced rule. *See* Pet.App. 68A. Before the Court of Appeals certified its decision as final to the trial court, the BMV petitioned the Indiana Supreme Court to accept the case on discretionary review. Pet.App. 8A. The BMV's petition automatically stayed certification of the Court of Appeals' judgment, which means it did not go into effect before the BMV promulgated its new administrative rule. Ind. Appellate Rule 65(E). Villegas—who does not acknowledge these facts—cannot claim that the plaintiff class benefited from a decision that never went into effect.

II. The Decision Below Departs From Federal Circuit Court Holdings Requiring That a Plaintiff Actually Benefit From a Final Judgment to Receive Section 1988 Fees

As the BMV explained in its Petition, some federal circuits disagree as to when a judgment directly benefits a plaintiff sufficient to justify an award of Section 1988 fees. *See* Pet. 13-14. In contrast with the decision below, however, these circuits *all* agree that at least *some* direct benefit to the plaintiffs resulting from the litigation is necessary to justify fees. Federal circuits also agree, again in tension with the decision below, that courts must look closely for a material alteration of the relationship of the parties, rather than for a mere judicial stamp of approval on a plaintiff's claim. A victory that does not put the plaintiff in a better

position is not, in the federal circuits, a victory. The Indiana Court of Appeals, however, ignored the lack of demonstrable benefit to the plaintiff class; that error justifies reversal.

1. In *Barnes v. Broward County Sheriff's Office*, the Eleventh Circuit held that "a plaintiff must obtain some benefit from the defendant *at the time the litigation ceases*[,]" to achieve prevailing party status. 190 F.3d 1274, 1279 (11th Cir. 1999) (emphasis added). The court found that the plaintiff, who alleged violations of the Americans with Disabilities Act and the Age Discrimination in Employment Act, was not a proper recipient of attorney fees despite his success on his ADA claim against the sheriff's office. *See id.* at 1276, 1279. Even though the trial court enjoined the County from administering a psychological test as part of its deputy exam, the Eleventh Circuit held that because there was no evidence that the sole plaintiff, Barnes, intended to re-apply for the deputy position or was even eligible to do so, the trial court's decision neither changed the relationship between Barnes and the county, nor directly benefited Barnes. *See id.* at 1278. Thus, because he did not benefit from a technical victory, Barnes was not a prevailing party entitled to receive fees. *See id.* at 1278, n.3.

2. In *Martinez v. Wilson*, the Ninth Circuit held that although the plaintiffs succeeded on their claims, because the amount of funding that they received had actually decreased due to the litigation, the plaintiffs did not directly benefit in a way that

made them prevailing parties. 32 F.3d 1415, 1422 (9th Cir. 1994). The court rejected the plaintiffs' argument that despite their failure to secure any monetary benefit, they had an interest in seeing the government follow the law. *Id.*

Villegas' summary of *Martinez*—"the plaintiffs . . . did nothing but vindicate the general interest in having government obey the law, thereby not obtaining any direct benefit in a case that had become moot through changes in federal law" (Villegas Br. 14 n.3)—is an apt description of why the plaintiffs in *this* case do not deserve fees. Here, the plaintiffs raised two issues. First, they claimed that the BMV failed to follow the Indiana Administrative Rules and Procedures Act in promulgating its licensing rules. This claim was upheld by the Indiana Court of Appeals, and during the pendency of its appeal, the BMV responded by properly passing substantially the same rule. Second, the plaintiffs asked the court to find that the BMV's rules were unconstitutional. No court issued a ruling on this claim and Villegas has not been precluded from asserting it anew against the properly promulgated rule.

As the Ninth Circuit understood, forcing the government to follow its own rules does not alone qualify a plaintiff for attorney fees under Section 1988.

3. The Fifth Circuit, in *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 556 (5th Cir. 2008),

denied attorney fees even though the plaintiffs still had a "victory" in the form of a requirement that the government provide judicial due process as part of its city permit and license revocation proceedings. The court found that this was not substantial enough to support fees because the plaintiffs had lost on many of their other claims, and the government could still enforce its license revocation provision (as long as it provided judicial due process). *Id.* Thus the plaintiff must not only directly benefit, but the relief gained must be more than nominal when compared to the relief requested.

Here, plaintiffs received precisely the kind of victory that *Roark* declared insufficient for Section 1988 fees: a "victory" where, after the litigation, the same rules are being enforced, albeit with greater procedural protections. This is not enough, by itself, to be considered a victory, especially when the procedural victory was not even as significant as that in *Roark*, where at least the plaintiffs forced the defendants to provide judicial due process along with permit and license revocation procedures.

4. Villegas dismisses *Johnson v. Lafayette Fire Fighters Association Local 472*, 51 F.3d 726 (7th Cir. 1995), as an application of the "catalyst theory" resulting in a finding that the plaintiffs had achieved a material alteration of the legal relationship between the parties. Villegas Br. 14 n.3. However, Villegas has similarly advanced what amounts to an argument for application of the catalyst theory, which was firmly rejected by this

Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). By relying on the BMV's voluntary edits to the rule during promulgation—edits that were *not* mandated by the Court of Appeals—Villegas is essentially making the argument that this litigation was the catalyst for the (at best) hypothetical benefit the plaintiff class received.

Notwithstanding the Seventh Circuit's application of the catalyst theory, *Johnson* stands for the more fundamental principle that Section 1988 fees are warranted only when the plaintiff has achieved more than a mere technical victory and the judgment recovered substantially matches the recovery sought. *See Johnson*, 51 F.3d at 731 ("This circuit has adopted the three-part test laid out in the concurring opinion of Justice O'Connor in *Farrar* to determine whether a prevailing party has achieved a mere technical victory inappropriate for fees.").

5. In contrast, the Court of Appeals in this case avoided any examination of whether the plaintiffs benefited from the litigation. For example, it ignored the subsequent rule passed by the BMV as "irrelevant," though the Eleventh Circuit declared that the appropriate time to evaluate whether the plaintiff benefited is at the end of litigation. *See Barnes*, 190 F.3d at 1279. The Indiana Court of Appeals also failed to evaluate whether the relief obtained matched the relief sought (as required by the Seventh Circuit) or whether the plaintiff class

obtained the *actual* objective of the litigation or instead scored only a technical or procedural victory (as required by the Fifth and Ninth Circuits).

Accordingly, the Court of Appeals' analysis in this case is in clear tension with federal circuit decisions requiring a direct benefit to the plaintiff before Section 1988 fees may be awarded. The Court should grant review and reverse to eliminate this tension.

III. The BMV Argued Below That Section 1988 Fees Are Inappropriate When Based on Undecided Fee-Generating Claims That May Be Adjudicated Later

Contrary to Villegas's assertions, the BMV has properly preserved the argument that fee claims should not be awarded when the undecided federal claims upon which they are based can be raised anew in a future lawsuit. *See* Villegas Br. 6. The potential for double-recovery of fees has always been an integral part of the BMV's argument that a party should only receive Section 1988 fees if its successful state claim makes adjudication of its federal claims impossible. In its briefs before both the Indiana Court of Appeals and the Indiana Supreme Court, the BMV argued that it would be inappropriate to award Villegas attorney fees for prevailing on a non-fee state law claim only. Supp.App. 8A ("The Plaintiffs obtained nothing more than a technical victory on a state law claim that did not benefit them personally."); Supp.App. 4A ("Furthermore, because

the relief awarded was so inconsequential, it is not hard to imagine that Plaintiffs might yet file another lawsuit seeking to invalidate the formally promulgated identification rule using the same federal claims and theories that they pursued in *Villegas I*."). Thus, it is clear that the BMV has properly raised and preserved this issue and is not, as Villegas contends, "rais[ing] this claim now for the first time." Villegas Br. 16.

Indeed, the Respondents themselves acknowledged the BMV's "shielding" argument in response to the BMV's petition for discretionary review in the Indiana Supreme Court. *See* Supp.App. 2A ("Nevertheless, the BMV attempts to construct a policy argument, completely unsupported by precedent, that fees can not be allowed because if the plaintiffs filed a new case challenging the new promulgated rules on substantive grounds and won, they could get fees again."). Notably, Respondents did not assert at that stage that the BMV had waived this argument. In any event, the BMV properly presented its shielding theory to the lower courts.

Otherwise, Villegas opposes plenary review by citing several cases which he claims demonstrate that when a court strikes down a statue or rule on state law grounds, "it is frequently the case that [any pendent] federal law claims may be renewed in subsequent litigation . . . ." *See* Villegas Br. 16-17 (citing *Southwestern Bell Tel. Co. v. City of El Paso*, 346 F.3d 541 (5th Cir. 2003); *California State*

Outdoor Adver. Ass'n Inc. v. California, No. S-05-0599, 2006 WL 662747 (E.D. Cal. Mar. 16, 2006); *Bangs v. Town of Wells*, 834 A.2d 955 (Me. 2003)). At least two of these cases, however, demonstrate no such thing.

In *Southwestern Bell*, the plaintiff obtained all the relief it sought—the ability to lay telephone lines crossing irrigation ditches without having to apply or provide payment to the county water improvement district—through adjudication of its state law claim. 346 F.3d at 547-49. In *Bangs*, the owner of a mobile home park challenged under state and federal law a town ordinance that prohibited him from expanding his park. 834 A.2d at 957. The Supreme Judicial Court of Maine held that the ordinance violated a state law that required municipalities to provide "reasonable consideration . . . to permit existing mobile home parks to expand their existing locations." *Id.* at 957 n.2 (citing Me. Rev. Stat. Ann. Title 30, § 4358(3)(M)). Thus, the plaintiff requested and received invalidation of the statute on grounds that prevented it from being revived through a procedural fix. In both cases, accordingly, Section 1988 fees were appropriate because the plaintiff would never have a chance for judicial review of the federal claim, in contrast with this case, where the BMV's substantive policy remains intact and susceptible to whatever federal claims Villegas or the plaintiff class wish to raise.

The third case cited by Villegas, *California State Outdoor Advertising Association, Inc. v. California*,

2006 WL 662747 (E.D. Cal. Mar. 16, 2006), where the court invalidated a California permitting scheme until the state agency promulgated it properly, does appear to be on point, though the memorandum decision is less than clear as to whether the First Amendment claim justifying fees was directed at past enforcement (which would make it distinguishable) or future enforcement. Regardless, the existence of this single, unpublished decision, while reinforcing the need for guidance, hardly demonstrates a commonplace understanding among the lower courts that Section 1988 attorney fees are warranted when a plaintiff prevails on a state law claim that does not shield a pendent federal claim from later adjudication. If anything, Respondent's strenuous efforts to identify even one case on all fours with this one underscores just how anomalous the award of fees under these circumstances really is.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 15, 2009

IN THE
SUPREME COURT OF INDIANA
NO._____

Court of Appeals Cause No. 49A02-0708-CV-754

Andrew J. Miller, *et al.*,	) Appeal from the
	) Marion Superior
	) Court No. 3
Appellant	)
(Defendant below),	)
	)
v.	) Trial Court No.
	) 49D03-0208-PL-I448
	)
Miguel Villegas, *et al.*,	)
	) Hon. Patrick L. McCarty,
	) Judge
Appellees	)
(Plaintiffs below).	)

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* * *

II. The Plaintiffs are prevailing parties in this case

* * *

Nevertheless, the BMV attempts to construct a policy argument, completely unsupported by precedent, that fees can not be allowed because if the plaintiffs filed a new case challenging the new promulgated rules on substantive grounds and won, they could get fees again. This double recovery potential, argues the BMV, demonstrates why the plaintiffs are not now entitled to fees. Of course, if a plaintiff files a procedural due process claim and wins and then, after process is afforded, files a new case and prevails on substantive constitutional grounds there can be a double recovery as well. What the BMVs argument demonstrates is the fallacy of its singular interpretation of § 1988 that looks not to whether the plaintiffs have obtained I a judicially sanctioned result that alters the legal relationship between the parties today, but instead attempts to peer into the future to make a determination as to whether the plaintiffs "really" prevailed.

* * *

IN THE
SUPREME COURT OF INDIANA
No. _____
Court of Appeals Cause No. 49A02-0708-CV-754

Ronald L. Stiver, et al.,	) Appeal from the
	) Marion Superior Court
Appellants	)
(Defendants below),	) Civil Division, Room 2
	)
v.	) No. 49D03-0208-PL-1448
	)
Miguel Villegas, et al.,	) The Honorable
	) Patrick McCarty, Judge
Appellees	)
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PETITION TO TRANSFER

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* * *

I. The Plaintiffs Are Not "Prevailing Parties"

* * *

There is, therefore, a substantial difference between the relief that was actually achieved by way of the Plaintiffs' state law claim and the relief that would have been achieved under their federal claims. Analyzing the Plaintiffs' success "in the context of what they sought to accomplish," *Mazanec*, 798 F.2d at 237, it is apparent that they did not achieve the goals of their litigation.

Furthermore, because the relief awarded was so inconsequential, it is not hard to imagine that Plaintiffs might yet file another lawsuit seeking to invalidate the formally promulgated identification rule using the same federal claims and theories that they pursued in *Villegas I*. If Plaintiffs were to do that and succeed, obviously they would be entitled to Section 1988 fees. Accordingly, permitting an award of fees here may lead to an anomaly whereby Plaintiffs' counsel is twice awarded Section 1988 attorney fees for a single civil-rights claim: once to underwrite a collateral state-law administrative procedure claim, and once to pay for the Section 1983 claim itself.

Notably, such double recovery of Section 1988 fees would not ordinarily result where a civil-rights plaintiff prevails on a non-fee state law claim

pendent to a Section 1983 claim. If, for example, the Plaintiffs in this case had prevailed on state constitutional substantive rights grounds rather than ARPA grounds, the BMV's identification rule would have been voided in substance with no reasonable likelihood that it would reappear and generate a second lawsuit featuring the same federal claim. Under the particular circumstances of the ARPA relief awarded here, however, that is a distinct possibility. Even if Plaintiffs do not pursue their federal claims anew, the continued availability of those claims on the same terms as before is sufficient to demonstrate why Section 1988 fees are not appropriate here.

Indeed, precisely because follow-on Section 1983 litigation over the ARPA-compliant identification policy is available to these Plaintiffs, to deny fees here would in effect merely be to hold them in abeyance pending the outcome of any re-instituted lawsuit. This is significant because the reason for permitting recovery of Section 1988 fees where a plaintiff prevails on pendant non-fee claims is that Congress did not want such non-fee claims to serve as a fee shield that would deter vindication of federal rights. *See Smith v. Robinson*, 468 U.S. 992, 1006 (1984), *overruled on other grounds by statute/rule* ("Congress' purpose in authorizing a fee award for an unaddressed constitutional claim was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a non-constitutional claim is dispositive."). But that policy is not implicated here. To the extent they have ever had valid claims, these very Plaintiffs still

have a chance at their day in court to vindicate their federal rights at the expense of the State. But because the rule they sought to challenge is still in force (albeit with some inconsequential differences), they have not yet prevailed in a way that is sufficient to justify Section 1988 fees. Accordingly, transfer is warranted to address the important issue whether Section 1988 fees should nonetheless be awarded in such circumstances.

* * *

IN THE
INDIANA COURT OF APPEALS

No. 49A02-0708-CV-754

Joel Silverman, *et al.*,	)	Appeal from the
	)	Marion Superior Court, No.2
Appellants	)	
(Defendants below),	)	
	)	
vi.	)	Trial Court Cause Number
	)	49D03-0208-PL-1448
Miguel Villegas, *et al.*,)		
	)	
Appellees	)	
(Plaintiffs below)	)	The Honorable Patrick
	)	McCarty, Judge

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3. An award of fees is inappropriate where the Plaintiffs failed to obtain the objectives of their federal constitutional claims.

As discussed in the preceding section, the Plaintiffs did not obtain the objectives sought through their federal claims. As illegal aliens, they still cannot obtain Indiana driver's licenses or identification cards and the mere requirement that BMV formally adopt the challenged requirements as rules did not vindicate the federal claims. Fees are not warranted as a result.

In any event, the attorneys for the Plaintiffs are not entitled to an award of attorney fees in circumstances where the attorneys failed to obtain a judgment that provided any useful relief to the Plaintiffs or the Plaintiffs' class.[2] The Plaintiffs obtained nothing more than a technical victory on a state law claim that did not benefit them personally. They were not able to obtain either driver's licenses or identification cards as a result of the case. In circumstances where a plaintiff obtains only a nominal victory, the attorney for the plaintiff is

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[2] This Court stated in *Villegas*, 832 N.E.2d at 604, that the Class was defined as "[A]ll current and future persons in Indiana who are, or who will be, required by defendant to produce information concerning their citizenship or immigration status in order to obtain an Indiana driver's license or permit or a state identification card, but who are, or will be, unable to produce the identification mandated by the Indiana Bureau of Motor Vehicle's non promulgated identification requirements."

usually not entitled to a recovery of attorney fees. Although not directly on point, where a party seeks compensatory damages but obtains no more than nominal damages, he is not usually entitled to an award of attorney fees. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). As stated by the United States Supreme Court, "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all." *Id.* The Court in *Farrar* made it clear that Section 1988 is not intended to produce windfalls for attorneys. *Id.* This is particularly true where federal claims have not been vindicated by the lawsuit, as in the case at bar.

* * *